

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DEBRA SPRITZER</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 222,297, 239,829
<b>KANSAS FURNITURE MART</b>	)	& 239,830
Respondent	)	
AND	)	
	)	
<b>HARTFORD ACCIDENT &amp; INDEMNITY COMPANY</b>	)	
and <b>TIG PREMIER INSURANCE COMPANY</b>	)	
Insurance Carriers	)	

**ORDER**

Claimant appeals the July 31, 2000, Award of Administrative Law Judge Bryce D. Benedict. Claimant was awarded an 8 percent impairment to the body as a whole as a result of the injuries suffered on March 29, 1996, and May 5, 1996, and a 5 percent impairment to the body as a whole as a result of the injuries suffered on June 28, 1997. Oral argument before the Board was held on April 18, 2001.

**APPEARANCES**

Claimant appeared by her attorney, Patrick R. Nichols of Topeka, Kansas. Respondent and its insurance carrier, TIG Premier, appeared by their attorney, Kevin J. Kruse of Overland Park, Kansas. Respondent and its insurance carrier, Hartford Accident & Indemnity, appeared by their attorney, Ronald J. Laskowski of Topeka, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopts the stipulations contained in the Award. At oral argument, the parties stipulated that the average weekly wage found by the Administrative Law Judge, of \$329.03 for the March 29 and May 5, 1996, dates of accident and the \$125.41 average weekly wage for the June 28, 1997, accident, are appropriate for the purposes of this appeal.

The parties further agreed that all the dockets in this matter were consolidated pursuant to the March 5, 1999, Order of the Administrative Law Judge and remain so for purposes of this award.

### **ISSUES**

- (1) What is the nature and extent of claimant's injury and/or disability for the alleged dates of accident? Respondent contends claimant did not put forth a good faith effort after her accidents to find comparable wage employment. Claimant contends she is entitled to a work disability for the injuries suffered while she was employed with respondent.
- (2) Did claimant suffer three separate accidents or did she suffer a series of accidents through June 28, 1997?
- (3) Did the Administrative Law Judge err in imputing an artificially reduced wage for claimant for her third accident and in denying claimant a work disability once he found claimant had not made a good faith effort to return to work?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds that the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Appeals Board adopts those findings and conclusions as if specifically set forth herein.

The Appeals Board finds the Award of the Administrative Law Judge in the above matter should be affirmed.

Claimant alleges three accidental injuries and a series ending June 28, 1997, while employed with respondent. Respondent admits to the first two accidents, but denies the third, and denies claimant suffered a series through June 28, 1997. The Board finds claimant suffered three specific traumatic accidents but has failed to prove a series of accidents ending on June 28, 1997.

The Appeals Board finds particularly compelling the medical evidence of Sharon L. McKinney, D.O., who assessed claimant an 8 percent impairment to the body as a whole for the injuries suffered on March 29 and May 5, 1996, to her upper back, neck and shoulders. It is also significant that initially claimant provided no low back complaints to

Dr. McKinney. The first indication in Dr. McKinney's medical reports that claimant had any type of low back complaints was in July 1997, after the June 28, 1997, accident. At that time, claimant described a separate accident while she was bending over to lift up the cover of a futon. Dr. McKinney testified that, until the July 1997 examination, she placed no restrictions on claimant. The Appeals Board finds there were no limitations placed upon claimant by any medical doctor prior to the June 28, 1997, accident.

Claimant's decision to limit her hours with respondent after the March 29 and May 5, 1996, accidents was a personal one rather than being based upon any medical restrictions. Claimant also testified that her limitation in hours was, in part, due to her desire to spend more time with her family. The Appeals Board finds claimant had the ability to earn a comparable wage after the March 29 and May 5, 1996, accidents, but did not put forth a good faith effort to find comparable wage employment. Instead, claimant voluntarily reduced her hours substantially, down to approximately 10 hours a week. Based upon the principles set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), the Board finds that claimant did not put forth a good faith effort to find employment and a wage based upon claimant's ability to earn wages must, therefore, be imputed.

The Appeals Board finds claimant was capable of remaining in respondent's employ without requiring a reduction in hours and without a reduction in income, particularly in light of respondent's offer to assist claimant with any lifting required by her job. The Appeals Board finds this offer of accommodation, coupled with claimant's decision to reduce her hours, limits claimant to a functional impairment for the above accidents. Dr. McKinney's 8 percent impairment to the body as a whole as a result of the first two accidents on March 29 and May 5, 1996, is the most credible impairment opinion in the record and is adopted by the Appeals Board for the purposes of this award.

Claimant suffered additional injury on June 28, 1997, to her low back. She was examined and treated by numerous doctors, including Michael J. Poppa, D.O., a board certified specialist in occupational and preventive medicine. Dr. Poppa assessed claimant a 5 percent impairment of the whole person to her lumbar spine based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. While he did opine that a percentage of that preexisted her accident, the Appeals Board does not find his speculation in that regard to be credible. The Appeals Board, therefore, awards claimant a 5 percent impairment to the body as a whole as a result of the low back injuries suffered on June 28, 1997.

Claimant's average weekly wage for the June 28, 1997, accident was stipulated at \$125.41 per week. The Board finds this wage to be appropriate for claimant's June 28, 1997, date of accident. After leaving respondent, claimant established that she had the ability to earn, and actually did earn, well in excess of that average weekly wage. Again claimant's decision to reduce her hours, and thus her income, was voluntary on her part, not necessitated by any medical restrictions placed upon her. Additionally, with the

exception of the Fresh Fries job, claimant made no attempt to obtain any employment with any employer after the June 28, 1997, accident and after later departing respondent's employ. The Appeals Board, therefore, finds that a wage should be imputed pursuant to the principles of Copeland, *supra*.

The Appeals Board finds claimant would be capable of earning a comparable wage even if she chose to work less than full time hours at minimum wage. The Appeals Board, therefore, finds claimant is limited to a functional impairment for the June 28, 1997, accident and awards her the 5 percent impairment to the body as a whole pursuant the opinion of Dr. Poppa.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the July 31, 2000, Award of Administrative Law Judge Bryce D. Benedict should be, and is hereby, affirmed.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Patrick R. Nichols, Topeka, KS  
Ronald J. Laskowski, Topeka, KS  
Kevin J. Kruse, Overland Park, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director